

APPEAL NO. 041870
FILED SEPTEMBER 15, 2004

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on June 23, 2004. The hearing officer determined that the compensable injury of _____, extends to and includes "the current HNP L3/4 and L4/5 low back injury," but does not extend to or include a left shoulder impingement syndrome injury, and the respondent (carrier) "did not waive the right to contest compensability of the claimed left shoulder impingement syndrome injury and the current HNP L3/4 and L4/5 low back injury by not timely contesting the injury in accordance with [Sections 409.021 and 409.022]." The hearing officer's determination that the compensable injury includes the low back injury and that the carrier had not waived the right to contest compensability of the low back injury have not been appealed and have become final pursuant to Section 410.169.

The appellant (claimant) appeals, principally regarding the carrier waiver determination of the left shoulder and that the left shoulder should be included as part of the compensable injury. The carrier responds, contending that the dispute was an extent-of-injury dispute and urging affirmance of the hearing officer's decision.

DECISION

Affirmed.

The claimant, a security guard, testified that he misstepped, "landed stiff-legged," jammed his hip and low back area, fell forward and hit his left shoulder on a cement wall on _____. The parties stipulated that the claimant sustained a compensable injury on that date but there is no stipulation what the compensable injury was. The carrier received the first written notice of a lumbar strain and low back injury on October 12, 1995. The claimant saw a doctor on October 18, 1995, and in an Initial Medical Report (TWCC-61) dated October 19, 1995, the doctor noted "Injured L shoulder & lower back." The claimant continued to get treatment for his low back and the hearing officer's determination that the compensable injury includes the low back has not been appealed. The next reference to a left shoulder injury is in a report dated April 1, 1996, from Dr. C, which states "initially had left shoulder complaints, but now reports that the shoulder is 'okay.'" A subsequent report dated April 24, 1996, from Dr. C diagnoses "left rotator cuff tear." The claimant had left shoulder surgery to repair a torn rotator cuff on August 14, 1996.

Principally at issue is whether the carrier waived the right to contest compensability of the left shoulder injury by not timely contesting compensability pursuant to Section 409.021, and if so, whether the dispute in the present case was a dispute on extent of injury rather than compensability. The carrier's first dispute is in a Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) dated May

30, 2001, where it disputed that the “compensable injury of _____” extends to the left shoulder. Another TWCC-21 dated August 7, 2003, also disputes the extent of injury to the left shoulder.

The hearing officer, in his discussion in the Background Information, comments:

Regarding the shoulder injury, the first report of an on-the job injury to the claimant was received by the carrier on October 12, 1995; the first report of a specific shoulder injury by the claimant was to his treating doctor on October 18, 1995 – the sixth day following date of notice of the injury incident. [The TWCC-61 was dated October 19, 1994.] It is not clear . . . how much of a time lag between reports to a provider and discovery of those reports by the carrier is allowable

The carrier contends that it did not waive the right to contest the left shoulder injury as an extent of injury citing Tex. W.C. Comm’n, 28 TEX. ADMIN. CODE § 124.3(c) (Rule 124.3(c)) which provides that Section 409.021 (the carrier waiver provision) does not apply to disputes of extent of injury. The carrier cites language from the preamble to Rule 124.3 to support its position. Rule 124.3(a) provides, in part, that upon receipt of written notice of injury the carrier shall conduct an investigation relating to the compensability of the injury. The hearing officer, in the cited quote, comments that he is not clear how much time lag between reports of provider and discovery of those reports is allowable. In Texas Workers' Compensation Commission Appeal No. 041738-s, decided September 8, 2004, the Appeals Panel addressed that point saying that:

[w]e hold that the injury that becomes compensable by virtue of waiver is not necessarily limited by the information listed on the first written notice of injury. Rather the nature of the injury will be defined by that information that could have been reasonably discovered in the carrier’s investigation prior to the expiration of the waiver period.

In this case the claimant did not even see a doctor until the sixth day after the carrier received the first written notice and the doctor’s TWCC-61 is dated on the seventh day after the first written notice. The hearing officer commented that “given that the original report to the carrier involved no mention of a shoulder injury, it would not appear reasonable to charge the carrier with knowledge of the shoulder injury before the time limit on a compensability dispute ran out. We agree with that analysis and that it applies our holding in Appeal No. 041738-s, *supra*.

Regarding the claimant’s appeal that the compensable injury extends to the left shoulder we note that while the left shoulder is mentioned in the October 19, 1995, TWCC-61, no other mention is made of the left shoulder until April 1, 1996, when Dr. C reports that the claimant said his left shoulder was “okay” and then on April 24, 1996, when the claimant was again apparently having problems. Dr. N a peer review doctor, testified that it was unlikely that the claimant had a left shoulder impingement injury or a torn rotator cuff for six months without any documented complaints or that the condition

was intermittent where it would be “okay” one day and symptomatic the next day. In any event whether the compensable injury included a left shoulder injury involved a question of fact and the hearing officer is the sole judge of the weight and credibility of the evidence and resolves what facts have been established.

We have reviewed the complained-of determinations and conclude that the hearing officer’s determinations are not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

We affirm the hearing officer’s decision and order.

The true corporate name of the insurance carrier is **CONTINENTAL INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**CT CORPORATION SYSTEM
350 NORTH ST. PAUL STREET
DALLAS, TEXAS 75201.**

Thomas A. Knapp
Appeals Judge

CONCUR:

Judy L. S. Barnes
Appeals Judge

Daniel R. Barry
Appeals Judge